In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-689

WILLIAM MARVIN ACREE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted on seven counts charging him with willful misapplication of federally insured bank funds and credits, in violation of 18 U.S.C. 656.[1] He was fined $5,000 on each count and placed on five years' probation on the condition that he not engage again in the banking business (App. 136).[2] The court of appeals affirmed (Pet. App.).

[1] All counts charged willful misapplication except count 3, which charged willful misapplication, abstraction and embezzlement.

[2] "App." and "Supp. App." refer to the Appendix and Supplemental Appendix filed in the court of appeals, copies of which are being lodged with the Court.

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The evidence with respect to counts 1–2 and 4–7 showed that petitioner, while president and majority stockholder of the victim bank, personally repaid loans owed to his bank by several of his business associates and received title to oil and gas leases which had been mortgaged to the bank to secure the loans (App. 117, 274, 280, 295–296, 302, 305–308, 322–323, 331, 372–378, 383, 392–393, 403–404). Petitioner misapplied funds or credits of the bank by causing its records to reflect that each loan was completely satisfied, when in fact he had not paid the accrued interest (App. 268, 270–271, 273–276, 291–292), or had applied the interest already received and credited in the records as current income against the outstanding principal of the loan (App. 280–281, 287–289, 296–297). Thus in each case the bank was deprived of the interest to which it was entitled on the loan, although petitioner was given full ownership of the collateral.

The evidence relating to count 3 showed that Jack Harris, a former bank employee, had sought to cash a matured certificate of deposit previously issued to him by the bank (App. 278, 355). Petitioner, using his authority as bank president, deducted and deposited in his personal checking account at the bank $2,025 from the money which Harris was entitled to receive, asserting that Harris owed him this sum on a personal real estate deal (App. 356–358). A private lawsuit subsequently filed by Harris was dismissed when petitioner paid him the $2,025 (App. 359–361).

1. Petitioner contends that the courts below erred by concluding that the evidence that he repaid the

loans at less than their book value was sufficient to show that his actions were intended to injure or defraud the bank. He argues that the loans had become substandard and that his actions in purchasing them were done for the benefit of the bank. The trial court, however, repeatedly instructed the jury that it must find that petitioner had intended to injure or defraud the bank (App. 780–784). Thus the question of criminal intent was squarely placed before the jury, which found against petitioner. The verdict was supported by the evidence. It was undisputed that petitioner had caused the records of the bank to reflect the loans as fully repaid despite his failure to pay the interest due the bank on these loans. Interest on loans and investments was the bank's primary source of income (App. 346). Petitioner's assumption of the liability for these loans, without first advising the Board of Directors or receiving the approval of the regulatory authority, violated customary banking procedures, a fact he could hardly have failed to know, since he had been in the banking profession over forty years (App. 471, 588–589). Moreover, although the interest due was never paid, petitioner acquired an unencumbered title to the oil and gas leases securing these loans (App. 262–263, 308, 376, 403–404). On two separate occasions he sold a lease thus acquired, together with other leases, for $200,000 (App. 378–380, 428; Supp. App. 75–77, 97–99). These facts sufficiently established a reckless disregard for the bank's interests, *Logsdon* v. *United States*, 253 F. 2d 12, 15 (C.A. 6), and an awareness that the natural result of his conduct could be injury

or loss to the bank. *Golden* v. *United States*, 318 F. 2d 357, 361 (C.A. 1).

2. Petitioner also claims that the trial court erred in not requiring a finding by the jury that his conduct resulted in a loss to the bank. The court's instruction (App. 780) that the prosecution did not have to establish "that the bank actually suffered any loss from the misapplication of moneys, funds or credits" was, however, in accord with the settled law that pecuniary loss to the victim bank is not an essential element of this offense. *United States* v. *Rickert*, 459 F. 2d 352 (C.A. 5); *United States* v. *Fortunato*, 402 F. 2d 79, 81 (C.A. 2), certiorari denied, 394 U.S. 933; *Golden* v. *United States*, *supra*, 318 F. 2d at 361; *Rakes* v. *United States*, 169 F. 2d 739, 743 (C.A. 4), certiorari denied, 335 U.S. 826.[3] The pertinent words of the statute are "willfully misapplies." Although the courts have construed the statute as containing a requirement (included in the judge's charge here) of an intent to injure or defraud the bank, *United States* v. *Fortu-*

[3] The cases cited by petitioner—*Batchelor* v. *United States*, 156 U.S. 426, and *United States* v. *Wiggenhorn*, 312 F. 2d 289 (C.A. 9)—are not in conflict. Both decisions involved dismissals of indictments under 18 U.S.C. 656 (or a predecessor version) for insufficiency of the allegations. In *Batchelor*, the Court found the indictment insufficient largely because it failed to state the manner in which the defendant had performed the alleged misapplication; in *Wiggenhorn*, the court held the indictment defective for failing to show that the misapplication was unlawful in view of the court's holding that the mere drawing of an overdraft did not constitute an offense under 18 U.S.C. 656. 312 F. 2d at 292. Compare *Ramirez* v. *United States*, 318 F. 2d 155, 158 (C.A. 9). Neither case, however, purported to hold that loss to the bank is an essential part of the offense.

nato, supra, 402 F. 2d at 80, proof that the bank actually suffered loss bears no relation to the prophylactic purpose of the statute to safeguard banks against loss by preventing conduct by a bank officer which is intended to impair the stability of his bank. See *United States* v. *Rickert, supra,* at 354. See also *United States* v. *Cooper et al.,* 464 F. 2d 648 (C.A. 10), pending on petitions for writs of certiorari, Nos. 72–483, 72–485, 72–525, 72–5454, and 72–5563.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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